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No. 07-424

Supreme Court, U.S.
FILED
DEC 19 2007
OFFICE OF THE CLERK

In The

Supreme Court Of The United States

FEMI BOGLE-ASSE AI,
Petitioner,

v.

STATE OF CONNECTICUT, COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES, CYNTHIA WATTS ELDER, LEANNE APPLETON AND DONALD NEWTON,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents

ON PETITON FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

COUNTERSTATEMENT OF THE CASE

In this action the petitioner, Femi Bogle-Assegai, asks this Court to review the Second Circuit Court of Appeals' decision affirming summary judgment for the respondents based upon the petitioner's untimely filing of her EEOC charge of discrimination under 42 U.S.C. § 2000e-5 (e). At issue is the Court of Appeals' rejection of the petitioner's assertion that she was entitled to the 300-day filing period.

The petitioner was fired from state employment as a Regional Manager with the Connecticut Commission on Human Rights and Opportunities ("CHRO") in 2001 because she fraudulently stole state time in excess of several thousand dollars. She was ultimately unsuccessful in her federal lawsuit because she: (1) failed to properly serve two individual defendants despite notice of the deficiency in service two years prior to the summary judgment ruling;[1] (2) failed to argue or offer any evidence before the District Court to dispute the 180 day filing period under section 42 U.S.C. § 2000e-5 (e); and (3) asserted an argument before the Court of Appeals premised

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[1] Petitioner's request for certiorari is limited to her Title VII claim. Petitioner does not seek certiorari regarding her claims pursuant to 42 U.S.C. §§ 1981 & 1983.

upon factual assertions not supported in the record or presented to the District Court.

The Court of Appeals relied on the following facts in reaching its decision. Defendants Watts-Elder, Newton, and Appleton all worked in management at the CHRO; Watts-Elder was the executive director, Newton was the chief of field operations, and Appleton was the fiscal administrative supervisor. Bogle-Assegai v. CHRO, et al., 470 F.3d 498, 499-500. Newton, in his role as chief of field operations, reminded all managers, Bogle-Assegai included, that they were expected to work their approved schedules. Id.

In early 2001, Newton began to question Bogle-Assegai's actual work times after he called her office one day at 10 am and was told by her staff that she had not yet arrived. Id. at 500. Although Bogle-Assegai later reported to Newton that she arrived at work at 9:30, not 8 as her schedule required, Newton questioned the issue further because Bogle-Assegai's staff had indicated that she had not yet arrived when he called at 10. Id. Newton then sought Appleton's help.

Bogle-Assegai had a designated parking space in the garage accessed by an electronic swipe card system. Id., at 500. Appleton, at Newton's direction, had obtained the swipe card history, which showed that Bogle-Assegai

arrived at work at 10:30 a.m. the day in question. Id. Further analysis of the swipe card history showed that Bogle-Assegai deviated from her approved schedule numerous times. Id. For example, for one period encompassing 68 workdays, Bogle-Assegai was more than one hour late 34 times and more than two hours late 15 times. Id.

Watts-Elder ordered an audit of all CHRO employees' times cards. Id. The audit revealed that Bogle-Assegai's time cards were contradicted by the swipe card history; she had been putting in for time that she did not work. Id. Watts-Elder initiated the disciplinary process, holding a formal hearing to give Bogle-Assegai an opportunity to submit a written explanation, but Bogle-Assegai's explanation did not address the time record discrepancies. Id. Watts-Elder sent Bogle-Assegai a letter on March 29, 2001 informing her that effective April 12, 2001, her employment was terminated for misuse of state time. Id. Bogle-Assegai filed a complaint with the Equal Employment Opportunity Commission on October 1, 2001 and received a right-to-sue letter. Id.

The defendants sought summary judgment before the District Court. The defendants claimed that the Title VII claims, the subject of this petition for certiorari, were not timely filed. Id., at 501. In support of their claim, the

defendants pointed to 42 U.S.C. § 2000e-5(e)(1), which requires that a complainant file a charge of discrimination with the EEOC within 180 days or, if the complainant files the discrimination charge with a local or state agency, within 300 days. Id., at 501-02. Bogle-Assegai filed only with the EEOC. The defendants argued that she had failed to file a timely complaint because October 1, 2001; was more than 180 days from the March 29, 2001 when Bogle-Assegai learned of her termination. Id. Bogle-Assegai did not agree and argued that March 29, 2001 was not the proper date to begin the limitations period. Id., at 502. Rather, Bogle-Assegai contended that the proper date to begin the limitations period was April 12, 2001, the effective date of her termination. Id.

The District Court granted summary judgment in favor of the defendants. It held that the date the termination decision was made and communicated to the employee (March 29, 2001) is the proper date to begin the limitations period. Id., at 503. It further held that Bogle-Assegai had filed only with the EEOC, so the 180 day limitation period applied. Id. Using March 29, 2001 as the operative date, the District Court held that Bogle-Assegai's claims were untimely. Id.

Before the District Court, Bogle-Assegai never raised any issue about the applicable filing period. She implicitly conceded that the correct period was 180 days because she did not argue that the 300 day period applied; instead she argued that the 180 days should start from a different date. Nowhere in her response to summary judgment did Bogle-Assegai suggest the existence of an enforceable work sharing agreement, nor did she rely upon any such agreement or make a claim for equitable tolling under any legal theory.

At the Court of Appeals, she raised for the first time the claim that there was a work sharing agreement between the EEOC and CHRO that designated each entity as dual agents for the other, and waived the 60 day exclusive jurisdiction of the deferral agency. According to Bogle-Assegai, the existence of the work-sharing agreement waiving the CHRO's exclusive jurisdiction to initially process all charges would result in automatic dual filing with the CHRO and EEOC. Relying on Tewksbury v. Ottaway Newspaper, 192 F.3d 322 (2d Cir. 1999), Bogle-Assegai argued that her claim was "initially" filed within the meaning of section 706 (e), 29 U.S.C. § 2000e-5 (e)(1).

However, conspicuously absent from Bogle-Assegai's summary judgment submission was any predicate evidence establishing crucial facts upon which

she now asks this court to rely. Petitioner's argument is premised entirely upon factual assumptions, conclusions, and speculations not supported by the record. For instance, the record does **not** show that Connecticut was a deferral state on October 1, 2001 (Petition, p. 17); that there existed a work sharing agreement between the CHRO and EEOC before and after October 1, 2001 (Petition, p. 16); that any lapse in a work sharing agreement in 2001 was technical and temporary (Petition, p. 14); that CHRO and EEOC continued to operate as though a work sharing agreement was in place after October 2001 (Petition, p. 14); that the EEOC actually transmitted Bogle-Assegai's October 1, 2001 complaint to the CHRO (Petition, p.18); and that any regulatory framework between the CHRO and EEOC was dismantled without notice (Petition, pp. 20-21).

Before the Court of Appeals, the defendants contested the existence of a valid work sharing agreement on the date Bogle-Assegai filed her EEOC charge and noted the lack of any evidence to support the allegations raised for the first time on appeal.

ARGUMENT

I. REASONS TO DENY CERTIORARI

This Court should deny the petition for certiorari because this case presents no conflict among the Courts of Appeal, it does not alleges that the lower court has departed from the accepted and usual course of judicial proceedings calling for this court's exercise of its supervisory powers, nor has it decided an important question of federal law that need be decided by this court.

This case is simply about a failure of proof by the petitioner to offer evidence in the record to support her claim. Now the petitioner asks this Court to engage in the type of speculation that the Court of Appeals refused to do, namely — to assume facts not in evidence and to address a new matter not raised before the district court.

The Court of Appeals rejected the petitioner's new argument about the applicable filing period for two reasons. First, she did not raise it before the district court. Second, there is no basis for equitable tolling.

A. The Policy Behind Title VII is Not a Basis For Disregarding the Plaintiff's Failure to Raise the Issue Before the District Court or the Lack of Proof.

Noting the absence of any argument before the District Court on the critical issue she now asserts, the court of appeals stated:

> It is clear that Bogle-Assegai did not make her present argument to the district court, although she had ample incentive to do so. Defendants' motion for summary judgment asserted that "there was no dual filing with both CHRO and EEOC (it was filed only with EEOC)," and thus that "plaintiff is not entitled to 300 days and her Title VII claim is untimely and must be dismissed . . . ." (Defendants' Summary Judgment Memorandum at 24 (emphases in original)). As described in Part I.B. above, Bogle-Assegai's response to this untimeliness contention made no reference to a work-sharing agreement, or to the concept of dual filing, or to any possibility that the applicable period was 300 days. Her memorandum argued only that defendants had used the wrong starting date for calculating the 180-day period and that the 180-day deadline had been met. (See Bogle-Assegai Memorandum Opposing Summary Judgment at 5 ("the court should not use the (March 29) date that the defendant indicates she 'would' be terminated; but rather the date that she was in fact . . . . effectively terminated[,] April 12").)
>
> At oral argument of this appeal, we asked counsel to review the record and inform this Court whether Bogle-Assegai had in fact argued in the district court that the 300-day

> filing period applied to her claims. In response, Bogle-Assegai's counsel submitted a letter stating that "counsel for Plaintiff-Appellant has made a diligent search of the record below and finds that with regard to the 300-day filing rule, Plaintiff-Appellant did not specifically argue the 300-day rule." (Letter from Bogle-Assegai's attorney Josephine Smalls Miller to this Court dated April 28, 2006 ("Miller Letter").)

Despite the lack of proof, the Court of Appeals nevertheless analyzed whether the argument about the applicable filing period simply presented an issue of law that required no additional fact finding. See Allianz Insurance Co. v. Lerner, 416 F.3d 109, 114 (2d Cir. 2005). Declining to address the merits of the argument raised on appeal precisely because it required the court to speculate about facts not in evidence, the Court of Appeals stated:

> Bogle-Assegai urges us nonetheless to entertain her present 300-day contention, arguing that we should take judicial notice that the EEOC regularly enters into such work-sharing agreements, that the existence of such an agreement presents an issue that is purely legal, and that CHRO should not be allowed to deny the existence of a work-sharing agreement on which she relied. These arguments are meritless.
>
> Bogle-Assegai's contention that "[t]his court may take judicial notice of the fact that the

> [EEOC] regularly enters into work-sharing agreements with state fair employment practices [sic]" (Bogle-Assegai reply brief on appeal at 2 (emphasis added) is not a sound basis for consideration of her new argument. Even if we were to take judicial notice of that practice in general, it would not ineluctably follow that there existed such an agreement between the EEOC and CHRO on October 1, 2001, in particular.
>
> Further, despite Bogle-Assegai's assertion that "the issue is purely legal and there is no need for additional fact-finding." (id. at 1 (internal quotation marks omitted)), the question of whether there existed a work-sharing agreement between the EEOC and CHRO on October 1, 2001, is a question of fact, not a question of law. Defendants state that no such agreement was in effect on that date (see Defendants' brief on appeal at 9 n.2); and if Bogle-Assegai had proffered any evidence that such an agreement did in fact exist on that date, there plainly would be a need for fact finding.

In sum, the remedial purposes of Title VII and the ability of the EEOC to enter into work sharing agreements are not undermined by this case. Bogle-Assegai's statement that she was victimized by a lapse in a work sharing agreement that she relied upon is not true. The ruling by the Court of Appeals is limited to the facts of the case premised upon the plaintiff's failure to raise the issue of the correct filing

period and the failure to support her claim by admissible evidence.

B. There Is No Legal Basis For Equitable Tolling

The Appellate Court further rejected Bogle-Assegai's assertion that she relied upon the existence of the work sharing agreement in filing her claim after 180 days had elapsed because there was no evidence to support this fact.

Petitioner chooses to characterize herself as the victim of circumstances described as a "dismantled" regulatory framework. (Petition pg. 21). This argument misses the mark because of the lack of evidence that Bogle-Assegai knew of a work sharing agreement and despite her best efforts to obtain relevant evidence and raise the issue before the District Court, her case was dismissed. That is not what happened. Bogle-Assegai never raised the issue of the 300 day filing period until her appeal before the Second Circuit and then made various representations of fact with no evidence in the record to support her assertions. Again, the Court of Appeals noted the inconsistency:

> In sum, faced with summary judgment motion expressly asserting that her charge had not been dually filed with the state agency and that the 300- day filing period

> therefore did not apply to her claims, Bogle-Assegai had every incentive and opportunity to contest that argument. She made no argument to the district court in opposition. And in arguing to this Court that the 300 day period is applicable, she proffered no reason for her failure to make that argument in the district court and has pointed to no evidence that would support her factual premises.

(App. p. 31).

CONCLUSION

There is no compelling legal issue to justify the High Court hearing this case. The petitioner did not present her argument about the 300 day limitation to the District Court. Because she did not present it to the District Court, she never submitted the necessary evidence to even make the argument. The Court of Appeals, after reviewing the petitioner's argument from every angle, held that the lack of evidence in the record to support her new argument about the 300 day limitation was fatal. There are no important policies implicated in this case. This case is ultimately about the petitioner's failure put the necessary evidence in the record to support her argument. Based upon the record presented to the Court of Appeals, there was no error.

Respectfully submitted,

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